

QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [<kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

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STANDARDIZED ASSESSMENT AND THE ACCOUNTABILITY MOVEMENT: THE ETHICAL DILEMMAS OF OVER RELIANCE

Indiana has followed the example of other states and has been instituting an accountability program for its public schools. Although “accountability” is a fairly broad concept within which assessment is supposed to be but one element alongside standards, public reporting, sanctions and rewards, and continuous improvement, the reality is that scores generated by standardized assessment tend to dominate the process if not drive it entirely. This, in turn, has resulted in an increase in suspect practices in the administration of such tests to outright defiance by local school officials or other groups opposed to standardized assessment and its uses.

Michigan investigated 71 schools last year when groups of students participating in the Michigan Education Assessment Program (MEAP) gave “nearly verbatim—and sometimes nonsensical—answers to open-ended essay questions on fifth, seventh, and eighth grade tests.”¹ Although some local school officials defended the similarity in responses by indicating this was the result of “rigid test-taking strategies and essay formats,” state officials indicated that the evidence was “significant” that cheating was widespread. A school determined to have cheated would receive scores of zero and would be ineligible for state incentive bonuses.

A special investigator for the New York City schools uncovered numerous instances of cheating, including teachers leaving answers to test questions where students could “find” them and prompting students to change answers.² In 1999, a “Texas grand jury indicted the Austin Independent School District on charges of criminal tampering. In what was believed to be the country’s first prosecution of a school district, investigators alleged that low-scoring students were excluded from the test, thus raising the overall results.”³ In California, eight high school teachers were disciplined for making copies of the state-mandated Stanford 9 test for science and providing them to their students to prepare them for the examination.⁴ In Arizona, the state sought to revoke the teaching and administrative licenses of a local school employee who allegedly photocopied a draft of the state’s graduation examination while it was in development and then provided the photocopy to consultants hired to prepare the local district’s teachers for the tests.⁵

State policy-makers have met with resistance from local officials. Massachusetts, when it provided local schools with its manual for the administration of the Massachusetts Comprehensive Assessment System (MCAS), originally advised principals that they were required to sign a “Test Administrator’s Security and

¹*Education Daily*, June 12, 2001.

²*Education Week*, May 17, 2000.

³“When Teachers Are Cheaters,” *Newsweek*, June 19, 2000, p. 49. Also see “Texas Official, District Charged with Altering Student Tests,” *Education Daily*, April 8, 1999, p. 3.

⁴*Education Daily*, April 10, 2000.

⁵*Education Week*, April 7, 1999.

Ethics Agreement.” The one-page agreement set out rules on confidentiality and cheating, along with the consequences for violating the rules. If the principals failed to sign the agreement, their credentials could be revoked. The complaints that followed resulted in the state’s Education Commissioner withdrawing the requirement.⁶

On October 26, 2001, New York’s Education Commissioner sent to a local school district a letter described as “stern,” advising the local superintendent to address directly a widespread boycott by students of the state tests. The boycott was allegedly aided in part by statements of dissatisfaction by school personnel regarding the state tests and the state standards upon which the tests are based. Parents organized the boycott. Reportedly, a majority of eighth grade students left school while the tests were being administered, returning to class later that day. No students were reported to have been disciplined.⁷

Other groups seek to undermine the validity and reliability of the tests by disseminating portions of the test in advance of their use. A Minnesota citizens’ group opposed to federal involvement in local schools recently posted on its web site test questions from a booklet used in the National Assessment of Educational Progress (NAEP). The citizens’ group was able to obtain the questions from a parent who was permitted to leave a school with the tests when it was given in 1996.⁸

Ohio officials had to rewrite essay questions for the state’s 4th and 6th grade writing examinations when newspapers quoted students describing the essay questions and published the story before many schools had given the tests.⁹

According to a “Special Report” in *Newsweek*, “[S]chool officials agree that the problem [of cheating by local school personnel] has become much worse in the past few years as more states have adopted testing as a way to audit national and state educational standards. In theory, the exams ensure that teachers pass on the right lessons. The problem is that high scores—not high standards—have become the holy grail.”¹⁰ Although a stated aim of standardized assessments is to serve as a diagnostic tool, the resulting scores do not provide a full

⁶*Education Daily*, April 10, 2000.

⁷*Education Daily*, November 1, 2001. Nearly two-thirds of the eighth grade students sat out the state science test. The local superintendent has assured state officials the school district would not condone a repeat of the protest. *School Law News*, January 18, 2002.

⁸*Education Week*, October 24, 2001. The group is also opposed to the types of questions asked (“They are an exercise in diversity training,” the web site asserts) and the collection of information the group deems “personal,” such as educational attainment of parents, race, and the amount of television the students watch.

⁹*Education Week*, April 7, 1999.

¹⁰“When Teachers Are Cheaters,” *Newsweek*, June 19, 2000.

picture of a child's or a school's accomplishments, according to the article. This has not halted the practice of relying upon scores as a "quick fix," such that "the pressure quickly trickles down to principals and teachers—who are supposed to be role models. No one's condoning cheating, but test critics see it as the inevitable side effect of score mania." *Id.*

Indiana and the Indiana Statewide Testing for Educational Progress (ISTEP)

Although Indiana began its journey into statewide standardized assessment prior to 1987, it was that year that a more coordinated, ambitious testing program was legislated. Known as the Indiana Statewide Testing for Educational Progress (ISTEP), it has expanded its purposes and scope significantly from its early design. Its current assessment avatar is known as "ISTEP+," a standards-based assessment system that also includes a graduation examination component in the 10th grade test. The scores generated by the ISTEP+ will play a significant role in the accountability plan instituted by the Indiana General Assembly in 1999.¹¹

Early on in ISTEP's creation, it became necessary to advise school officials of ethical practices, not only in the administration of the ISTEP itself but in preparing students to take the test. Eventually, it became necessary to develop a formal "Code of Ethical Testing Practices and Procedures," which became available in 1995. The Code is published annually as an appendix to the ISTEP+ Program Manual. The Program Manual itself devotes an entire chapter to "Ethical Test Preparation," decrying as inappropriate "any activity in the school or classroom that creates an excessive focus on the specific test content of ISTEP+ for the purpose of artificially raising test scores, whether overt or inadvertent..."

The ISTEP+ Program Manual details appropriate and inappropriate activities. For example, it is considered appropriate to:

- Review with all students at the beginning of the school year all skills and concepts taught in previous years;
- Review language arts and mathematics skills and concepts along with a general review of other learning domains;¹²
- Review ISTEP+ objectives as part of a general review of critical curricula; and
- Have students complete the ISTEP+ Practice Test that is included with regular ISTEP+ materials at a time suggested by the appropriate ISTEP+ Examiner's Manual.

The list of inappropriate activities—pre-test, during the test, and post-test—is significantly longer. It is considered inappropriate to:

- Teach ISTEP+ test content that has not been previously covered during the time period immediately preceding the examination (i.e., "cramming");

¹¹The principal law instituting the accountability process was P.L. 221-1999. The law is typically referred to as "PL 221" rather than by its various statutory provisions.

¹²The ISTEP+ assesses student proficiency in mathematics and English/language arts, although science and social studies will be added in the next testing cycle.

- Review ISTEP+ related skills and concepts with only those students to be tested;
- Limit class time to review of only the Academic Standards tested by ISTEP+;
- Select for review only those ISTEP+ objectives on which students performed poorly on previous examinations;
- Call students' attention to the fact that a similar question will be on the approaching ISTEP+ test;
- Use current, past, or parallel ISTEP+ test items as test review materials except those materials authorized for such use by the Department of Education (e.g., the released applied skills items found in the Teacher's Scoring Guides for Grades 3, 6, and 8 and the Graduation Qualifying Exam);
- Make minor alterations in ISTEP+ test items (such as changing the order of multiple-choice answers) and use such materials for review of instruction;
- Develop and use elaborate ISTEP+ review materials (workbooks, worksheets, etc.);
- Set aside blocks of time to teach only the content and skill proficiencies measured on ISTEP+;
- Coach students by indicating in any way (e.g., facial expressions, gestures, or the use of body language) that an answer choice is correct or incorrect, should be reconsidered, or should be checked;
- Allow students to use any type of mechanical or technical devices (calculators, computers) unless the test directions requires such use or the device is documented as a necessary testing accommodation;
- Answer students' factual questions regarding test items or vocabulary;
- Read any parts of the test to students, except as indicated in the test directions or documented as an acceptable accommodation for a student with a disability; and
- Alter students' answers, other than to check and erase stray marks or to darken answer "bubbles" after testing.

The lists above are not exhaustive. There are other caveats regarding test security, including the need to ensure certain documents are not duplicated, copied, or otherwise removed from a room without supervision.

Breaches of security or the ethical code can result in the school being placed on probationary accreditation status, losing eligibility for consideration of state incentive funds, and invalidation of scores.

To date, no school has been placed on probationary accreditation status for a security or ethical violation. However, in some instances, scores have been invalidated. At this writing, there have been no substantiated instances of widespread, concerted efforts to cheat on the ISTEP+. Nevertheless, it would appear from the experiences of other states that, as accountability laws with sanctions are implemented, the pressure to demonstrate achievement through statistical improvement evidenced by standardized test scores makes unethical test preparation and administration tempting. It is possible that institutional and professional sanctions may follow.¹³

Courting Disaster: Litigation and Statewide Assessments

¹³Licensed school personnel who engage in cheating on the ISTEP+ could have their licenses revoked or suspended under Indiana law. License revocation actions can be initiated based upon allegations of, *inter alia*, immorality, misconduct in office, or willful neglect of duty. See I.C. 20-6.1-3-7(a).

Not all reported cases involving security breaches or unethical practices involve accountability laws. Some are personal in nature. However, all the cases demonstrate an underlying criticism of over-reliance on test scores: Statistics cannot tell the whole story.¹⁴ Statistical improvement may not represent any real improvement, any more than lack of statistical improvement is concrete evidence of a failing school. Notwithstanding, it is statistical improvement that drives the measurement of progress in publicly funded education. The following are representative cases of current litigation associated with the problems of statewide assessment and the concomitant pressures that accompany such testing.

Haynes v. Bd. of Education of City of Bridgeport, 783 A.2d 1 (Conn. App. 2001) involved a 24-year employee of the school district. Fearful that she would “stagnate” as a teacher, she sought administrative posts. Connecticut has a mandated statewide test (the Connecticut Mastery Test) that is administered in grades 4, 6, and 8. It measures achievement in reading, language arts, and mathematics. Scores are used to determine the need for remediation and for ability-grouping placements, especially in the 9th grade. An important section of the Mastery Test for the 8th grade students is the “Degrees of Reading Power” (DRP), which measures the depth of a student’s vocabulary and ability to spell, two key areas for which Haynes taught most of the students being tested. During the time she was seeking administrative posts, she was also the test proctor for the administration of the DRP. When she collected test booklets, she completed tests for some students who did not finish the test and changed answers on other tests. As a result, 96 percent of her students exceeded the goal for achievement on the DRP section, the highest in the state. While this “enhanced the plaintiff’s reputation,” it also resulted in these students being placed in advanced English when they entered high school the following year. 783 A.2d at 3. It became apparent that something was awry. The students were retested by the school district. After the retest, only 15 percent exceeded the achievement goal, meaning that 81 percent had been inappropriately placed in advanced English. The ensuing investigation revealed the teacher’s involvement in tampering with the answers. She was terminated by the school board because her activities resulted in: (1) the deprivation of remedial reading assistance that many of the students needed; (2) inappropriate placements; (3) distorted feedback to parents on their children’s achievement levels; (4) deprivation of needed state funds for remedial programs due to artificial scores; and (5) false reporting of results statewide. It also appeared the teacher did not allow the students the full time to complete the test, providing her with the time needed to complete student tests or change answers. At 7. The court upheld her termination.

Although Haynes was a tenured teacher, the gravity of the situation outweighed positive factors and supported the school board’s termination. In Professional Standards Com’n v. Denham, 556 S.E.2d 920, (Ga. App. 2001), the court upheld the six-month suspension of a kindergarten teacher’s license after she altered answers

¹⁴This is a polite way to rephrase the statement commonly attributed to Mark Twain (*Mark Twain’s Autobiography*, 1924, p. 246) or Benjamin Disraeli: “There are three kinds of lies: lies, damned lies, and statistics.”

to a student's standardized test.¹⁵ The teacher had an otherwise spotless record, but the state's interest in ensuring the integrity of standardized test results outweighed her spotless record and any impact her suspension may have on the operation of the local school district.

A probationary teacher sued for alleged civil rights violations when she was terminated for helping students cheat on standardized tests. In Rivera v. Community Sch. Dist. Nine, 145 F.Supp.2d 302 (S.D. N.Y. 2001), the probationary teacher was included in a December 1999 report by a special investigator for the New York City schools.¹⁶ The report was titled "Cheating the Children: Educator Misconduct on Standardized Tests," and alleged that educators in New York City were employing a variety of inappropriate means to raise student test scores. Rivera was cited for being present in 1995 when a "cheat sheet" was prepared the day before the citywide reading and math tests were given to all third graders. She denied any involvement, but interviews with her students established that Rivera did, in fact, cheat on that test. She was assigned to non-teaching duties in another school and subjected to a disciplinary hearing. The school district found that she cheated on the 1995 citywide tests and failed to report to her supervisors the existence of the "cheat sheets" that were being used by staff to assist students during the tests. She received a "strong letter of reprimand." In August of 2000, the special investigator issued a supplementary report, accusing Rivera of assisting students during the 1999 citywide standardized reading test, pressuring other students to do likewise, and attempting to strike another teacher who refused to engage in the cheating scheme. She denied the allegations, but was subsequently dismissed following a disciplinary hearing. The court granted the school's motion to dismiss her civil rights claims.

Helbig v. City of New York, 622 N.Y.S.2d 316 (A.D. 2 Dep't. 1995) was an action for negligence and fraud against the student's principal, among others. The principal altered the answer sheets on the citywide mathematics and reading tests of a number of students in his building, including the plaintiff, who was a student with a learning disability. Although the student had difficulty in his school work, he attained high scores on the citywide tests (94th percentile in reading and 87th percentile in math his second grade year). His teachers could not reconcile these differences.¹⁷ The pattern continued in the third and fourth grades, but the principal would not permit retesting and denied access to special education services for the student. In the fifth grade, the principal permitted re-testing, which revealed the student functioned in the low-average range with significant weaknesses in practical judgment and visual/spatial reasoning. Nonetheless, when the citywide tests were administered later in the year, he again had high scores. When he moved into intermediate school, he scored in the 29th percentile in reading, 52nd percentile in math, 53rd percentile in problem solving, and 35th percentile in computation. These low scores persisted throughout intermediate school. When he entered high school, he

¹⁵The test was the Iowa Test of Basic Skills (ITBS). The school uses the ITBS to determine placement in its gifted programs. The teacher felt the student in question had "guessed" too many correct answers. She did not believe the child was gifted. She changed correct answers to make them incorrect.

¹⁶See *Education Week*, May 17, 2000, referenced *supra*.

¹⁷The facts are found at Helbig v. City of New York, 597 N.Y.S.2d 585 (N.Y. Sup. 1993).

was determined to be learning disabled. The New York City special investigator did cite the elementary school principal for tampering with the scores of his students, and for having done so for a number of years. The student's claims were dismissed because they alleged "educational malpractice," which is not a recognized cause of action.¹⁸ In a related action, Sica v. Bd. of Education of the City of New York, 640 N.Y.S.2d 610 (A.D.2 Dep't. 1996), it was revealed that the principal at Helbig's school cheated on the citywide tests from 1979 to 1990 by altering student answers, causing his school to rise in the rankings from 173 to No. 3, with first-place rankings in 1985 and 1986.

Richardson v. Newburgh Enlarged City Sch. Dist., 984 F.Supp. 735 (S.D. N.Y. 1997). A former high school English teacher sued, alleging various civil rights violations for her "constructive discharge" when she resigned after school officials recommended she be terminated. Richardson had considerable experience as a teacher of Advanced Placement (AP) English, as well as experience in curriculum development and as an AP English examination developer. However, on May 7, 1993, she distributed to her AP English students several unreleased examination questions. This occurred three days before the AP English examination. She had obtained the questions while employed by the Educational Testing Service (ETS). She photocopied portions of the draft examinations and retained the "live" materials in contravention of her employment agreement with ETS. School officials soon learned from the students that they had previously seen portions of the AP English examination before it was administered on May 10, 1993. The school investigated and confronted Richardson with its findings. She asserted that the security breach was unintentional, but she was evasive regarding the means by which she came into possession of the "live" materials. She was likewise less than forthright regarding other areas of her assigned responsibilities as well. Regardless of her intention in disseminating the materials, school officials believed she demonstrated poor judgment and recommended she be terminated from her teaching position. She chose to resign, which the school board accepted, albeit by a 6-2 margin. The court rejected her subsequent arguments that she was constructively discharged from her position as the result of racial animus or that she was treated differently from similarly situated non-African American faculty. The school officials, the court found, had established a legitimate, non-discriminatory reason for recommending her termination.

In Vogelsang v. Toledo Bd. of Education, 1986 WL 1288 (Ohio App. 1986), the court upheld the termination of a high school history and government teacher for "immorality" when he gave three students copies of an examination they were to take the following day. His apparent motivation, according to the court, was to increase the prestige of his high school by having his students perform well on the test. The test was actually an "Americanism and Government" test sponsored by the American Legion and taken by high school students. It is a voluntary test, but it is administered at school during the school day. The same test is given statewide, with state winners receiving a trip to Washington, D.C., Williamsburg, Virginia, and Gettysburg, Pennsylvania, with the expenses paid by the American Legion. Vogelsang also conducted study sessions to help interested students prepare for the exam. Assisting and encouraging students to cheat on the examination was sufficiently "immoral" to warrant termination of his teaching contract.

¹⁸See "Educational Malpractice: Emerging Theories of Liability," **Quarterly Report** April-June: 2001.

While Vogelsang addressed immorality, Chicago School Reform Bd. v. Substance, Inc., 79 F.Supp.2d 919 (N.D. Ill. 1999) involved insubordination. In 1998, the school district developed tests to assess the educational levels of freshmen and sophomore students. These tests also determined up to 20 percent of a student's grade in various academic subjects. The cost to develop the tests was about \$1.3 million. To protect its investment, the school district copyrighted the tests. The copyright notice was evident. The school district also implemented the "Chicago Public Schools Test Security Guidelines" and distributed these to all school personnel who would handle test materials. George Schmidt, a teacher with the school district and the editor of the newspaper *Substance, Inc.*, helped administer the test. Although he had received information prohibiting him from duplicating any of the test material, Schmidt published entire copies of five of the 22 tests and a substantial portion of a sixth test. Two of the test reproductions in *Substance, Inc.* actually included the school's copyright notice and restrictions on reproducing any portion of the test. The school sued the teacher for copyright infringement. The court was not persuaded by the teacher's assertion that "fair use" protected him from copyright infringement. The First Amendment, the court noted, does not permit the teacher to publish the school's copyrighted tests. Although the teacher wished to stir public debate regarding the tests, he could have generated such discussions without destroying the future usefulness of the tests. Even assuming the publication might be constitutionally protected speech, the harm from unnecessary destruction of the value of the standardized tests outweighed the teacher's interests in commenting on issues of public concern.¹⁹

"Whistle Blowers" and the Integrity of the Test

Canary v. Osborn, 211 F.3d 324 (6th Cir. 2000) involved an assistant principal who attended a district-wide meeting of various administrators where discussions were had regarding how to increase student achievement test scores. According to Canary, one administrator indicated she would have actual copies of the upcoming statewide tests that she would share with principals. The principals could make handwritten copies and then review this information with building teachers. Canary objected to this procedure, as did Canary's principal, Mike Welton (see *infra*). Notwithstanding these objections, Canary believed that the hand-copying of the tests occurred. He wrote to the State department of education, which contacted the superintendent and asked for an investigation to be conducted. Following the internal investigation, the state did determine the district was out of compliance with the state requirements that "each district establish written procedures protecting the security of test materials while they are in school." At 326. The district was directed to discontinue the practice of encouraging or allowing teachers to preview the tests currently being administered for the purpose of "improving test-taking techniques." *Id.* There was no evidence, however, that the test materials were used to help any student cheat on the tests. Canary was confronted by the local superintendent regarding his letter that initiated the investigation. Later, the school board, in executive session, demoted Canary to classroom teacher, allegedly because of financial constraints. Shortly thereafter, the board created "student facilitator" positions that were basically the same functions Canary performed before his demotion. Canary sued the school board members, asserting that his demotion infringed upon his right to speak out on matters of public concern, and

¹⁹For additional cases where the security of statewide assessments was threatened or the integrity of the test undermined by dissemination of questions to the public in advance of the administration, see "Access to Public Records and Statewide Assessments," **Quarterly Report** April-June: 1998.

that the demotion was in retaliation for his refusal to engage in the cheating scheme and for reporting the security breach to the Ohio Department of Education. He sued the board members in individual as well as their official capacities. The board members moved for summary judgment, asserting that they enjoyed absolute legislative immunity. The federal district court disagreed. On appeal, the 6th Circuit Court of Appeals likewise disagreed with the school board, noting that the activities of the school board were not “legislative,” and that a job is not abolished where the appointing authority simply transfers that job’s duties to a new employee to perform. The matter was remanded to the district court to conduct further proceedings.

Welton v. Osborn, 124 F.Supp.2d 1114 (S.D. Ohio 2000) is the companion case to Canary. Welton was Canary’s immediate supervisor. He was demoted to classroom teacher and later terminated for his criticism of the cheating on standardized tests in the district. He sued the superintendent and the school board, alleging civil rights violations similar to Canary’s allegations. A jury trial was conducted, resulting in a verdict of \$242,625 against the superintendent. In this action, Welton sought contribution to his retirement fund as though he had not been dismissed as an administrator. He also sought attorney fees. The court declined to award the contribution to the retirement fund because the school district had been found not liable by the jury. The school district—not the superintendent—makes such contributions. However, Welton was entitled to reasonable attorney fees and costs totaling nearly \$78,000 even though some of his attorney’s work also benefitted Canary.

In Rodriguez v. Laredo Ind. Sch. Dist., 82 F.Supp.2d 679 (S.D. Tex. 2000), a former assistant superintendent sued her former school district and its superintendent following her demotion allegedly in retaliation for her reporting testing irregularities to the state. The dispute arose in 1998 when Rodriguez was informed that a teacher had improperly obtained an advanced copy of the Texas Assessment of Academic Skills (TAAS) and had used it to prepare her students. The cheating was reported to the Texas Education Agency (TEA). Rodriguez also reported the incident to her superintendent, who initiated his own investigation. Rodriguez was also concerned that teachers were engaged in a technique known as “pacing,” a system where the teacher conducting the testing instructs students—contrary to the mandated testing procedures—to work only on one or a small group of questions, then stop and not proceed until directed to do so by the teacher. According to Rodriguez, this enabled teachers to be aware of what all the students were working on and provide improper and unlawful assistance. At 681. Rodriguez sought to discontinue this practice. TAAS scores declined in the district, which the principals attributed to the elimination of the “pacing” technique. Rodriguez reported her findings to the interim superintendent. When a new superintendent was hired, Rodriguez began to experience difficulties, including restrictions on approved travel and, eventually, a demotion to a position concerned with textbooks and janitorial services. Philosophical differences between Rodriguez and the new superintendent were also evident, including differences regarding the viability of norm-referenced testing as predictors of college aptitude. Rodriguez filed a grievance and eventually addressed the school board, which took no action. She then filed her civil rights’ suit, alleging violations of her free expression rights as well as violation of the state’s whistle blower law. The court dismissed the civil rights’ claims against the school district but not the “whistle blower” allegations because, if the cheating allegations and testing irregularities are true, these would constitute violations of TEA’s regulations and the school district’s responsibilities to enforce these regulations. The superintendent was entitled to qualified immunity. Although Rodriguez alleges numerous conversations with school officials regarding “pacing” and other irregular testing practices, her efforts to counter the perception that

increased test scores require the use of “pacing,” and her advocacy for norm-referenced tests as an accurate mode of assessment, these conversations were conducted as an employee and fell within the scope of her employment. Although the court noted that “mixed speech” claims can arise to the level of “public concern” even though such speech was job-based, the conversations in this case were predominantly related to Rodriguez’s job as an employee and were all intra-governmental in nature. Her complaints were not publicized. At 687.

THE PLEDGE OF ALLEGIANCE IN PUBLIC SCHOOLS

(Article by Dana L. Long, Legal Counsel)

I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all.

While this pledge is slightly different from the version most of us learned as schoolchildren, it is the original version of the Pledge of Allegiance as written by Francis Bellamy.²⁰ The concept of writing a pledge to the flag was the brainchild of James Bailey Upham, head of the Premium Department for *The Youth’s Companion*,²¹ to be promoted by the magazine as part of a nationwide celebration of Columbus Day. He arranged for this celebration to be built around the public schools and a flag salute that was, as yet, unwritten. Upham enlisted the assistance of the National Education Association to promote the celebration through the public schools of the nation. He described to Francis Bellamy what he envisioned for the salute, and Bellamy wrote the salute above. Francis Bellamy was appointed chairman of a committee of state superintendents of education in the National Education Association. He prepared a program for the public schools’ quadricentennial celebration

²⁰Francis Bellamy was a Christian socialist and a Baptist minister before becoming the circulation manager for *The Youth’s Companion*.

²¹*The Youth’s Companion* was a popular monthly magazine during the late nineteenth and early twentieth centuries, with articles aimed at the whole family. In 1892, it had a circulation of about 475,000, which grew to over 545,000 by 1901. After 1907, the magazine suffered a gradual decline in circulation until its final issue in 1929.

The magazine was the first to offer premiums for subscriptions, as well as a variety of other promotions. From 1888 through 1892, Upham was successful in introducing the flag into the public schools and classrooms through his School Flag Movement. His promotions included an essay contest in 1890 on the topic of “The Patriotic Influence of the American Flag When Raised Over the Public Schools,” and the selling of certificates for 10¢ representing one share in the patriotic influence of a flag over the schoolhouse. For the latter promotion, students sold 100 certificates for 10¢ each to raise the \$10.00 to purchase a flag for the school from the magazine. The school was then responsible for the flagpole. Upham’s promotion of flags in the schools was quite successful, resulting in 25,000 schools buying flags from *The Youth’s Companion* in 1891 alone. Upham and the magazine also encouraged states to pass legislation requiring schools to display the flag.

for Columbus Day in 1892.²² The pledge was first published in *The Youth's Companion* on September 8, 1892, and was distributed to schools throughout the country. On October 12, 1892, more than 12 million children recited the Pledge of Allegiance. (See Baer, John. The Pledge of Allegiance, A Centennial History, 1892 - 1992, Annapolis, Md. Free State Press, Inc., 1992; <http://www.usflag.org/the.pledge.of.allegiance.html>)

The Pledge of Allegiance has had several modifications over the years. The first, and most minor change, occurred within a month of publication when “to” was inserted before “the Republic.” The next change did not occur until 1923-1924. Under political pressure from the American Legion and the Daughters of the American Revolution, the National Flag Conference substituted the words “the Flag of the United States” for “my Flag.”²³ The last change to the Pledge of Allegiance occurred during the perceived threat of communism during the McCarthy era in the early 1950's. To ward off the anti-religious threat posed by the communists, Congress added the words “under God” in 1954. The current version of the Pledge of Allegiance follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

The Youth's Companion so successfully promoted the Pledge of Allegiance from its inception in 1892 until the magazine's demise in 1929 that the pledge was recited daily in many classrooms. It was not until 1942 that Congress officially recognized the Pledge of Allegiance, making it part of the United States Flag Code.²⁴ When recitation became mandatory, legal challenges followed. Most notably, the challenges came from parents and children who were Jehovah's Witnesses. The Jehovah's Witnesses objected to the Pledge of Allegiance as being contrary to their religious beliefs. They believed the Pledge to the flag violates the commandment set forth in Exodus 20:4, 5 which states “Thou shalt not make unto thee any graven image...” In the 1940's, the controversy surrounding mandatory recitation of the Pledge of Allegiance reached the United States Supreme Court.

²²The program was in eight parts:

1. Reading of the President's Proclamation by the Master of Ceremonies.
2. Raising of the Flag by Veterans.
3. Salute to the Flag by the Pupils.
4. Acknowledgment of God. Prayer or Scripture.
5. Song of Columbus Day by Pupils and Audience.
6. Address, “The Meaning of the Four Centuries.”
7. The Ode, “Columbia's Banner.”
8. Addresses by Citizens and National Songs.

Francis Bellamy wrote “The Address for Columbus Day, the Meaning of Four Centuries,” and the salute to the flag, the Pledge of Allegiance. <http://www.vineyard.net/vineyard/history/pdgech4.htm>

²³Francis Bellamy opposed this change to his pledge, but his protests were ignored.

²⁴4 U.S.C. § 4.

In Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010 (1940), Lillian Gobitis, age 12, and her ten-year-old brother William were expelled from the public school for refusing to salute the flag as part of a daily school exercise. Children were required to place their right hands on their breasts while reciting the Pledge in unison. As the word “flag” was spoken, the right hand was extended in salute to the flag. The salute was maintained throughout the remainder of the recitation of the Pledge. The Gobitis children were Jehovah’s Witnesses and maintained the salute violated their religious beliefs. This action was brought to seek an injunction to enjoin the school from expelling the children and from requiring them to salute the flag as a condition of attendance at public schools. The District Court granted the relief,²⁵ and the Third Circuit Court of Appeals affirmed.²⁶ In reversing, the Supreme Court did not view the requirement of reciting the Pledge and saluting the flag as an infringement on religious liberty.

The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects...Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.

Id. at 594. The state’s interest was found to be national cohesion, and such national unity was determined to be the basis of national security. The Court noted “[W]e live by symbols.’ The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.” Id. at 595.

Although it was a Supreme Court decision, the Gobitis opinion was not viewed with favor by all lower courts. Cases with similar fact situations, but different results, soon followed Gobitis as the lower courts sought ways to distinguish these cases. Like the children in Gobitis, the plaintiffs in these cases were also affiliated with the Jehovah’s Witnesses and refused to participate in the salute to the flag.

Bolling v. Superior Court for Clallam County, 133 P.2d 803 (Wash.S.Ct. 1943). The state of Washington required, as did Pennsylvania in Gobitis, that school children recite the Pledge of Allegiance. Children who refused to participate faced expulsion from school and were then brought before the juvenile court as delinquent children for not attending school. The single question before the court was whether the juvenile court had the right to take children from their parents and award the children to the custody of others because of the children’s refusal to participate in the Pledge. As in Gobitis, the children and their parents were affiliated with the Jehovah’s Witnesses and objected to reciting the Pledge as a violation of their religious beliefs. Petitioners claimed the requirement to recite the Pledge violated their rights under the First Amendment to the Constitution of the United States as well as their rights under the Constitution of the State of Washington, which provided:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or be disturbed in person or property on

²⁵Gobitis v. Minersville School District, 24 F.Supp. 271 (E.D.Pa. 1938).

²⁶Minersville School District v. Gobitis, 108 F.2d 683 (3rd Cir. 1939).

account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Constitution of the State of Washington, Amendment 4, approved November, 1904.

The Supreme Court of Washington referred to the dissent in Gobitis, and also noted other decisions that refused to follow Gobitis. In Barnette v. West Virginia State Board of Education, 47 F.Supp. 251 (S.D.W.V. 1942), a case factually similar to Gobitis, the court was careful to state its reasons for not following that case.²⁷ In State v. Smith, 155 Kan. 588, 127 P.2d 518 (Kan.S.Ct. 1942), the Supreme Court of Kansas held that a regulation requiring school children to participate in the flag salute violated the state Bill of Rights which guaranteed freedom of worship and speech.

The court in Bolling quoted at length from the dissent in Gobitis, noting the vital importance of the constitutional guarantees of freedom of religious belief and of speech to the maintenance of our system of government. The Constitution does not indicate that compulsory expressions of loyalty form any part in our government to override the Constitutional protection of freedom of speech and of religion. While expressions of loyalty, when voluntarily given, may promote national unity, the court failed to find any good purpose in compulsory expression of loyalty by children in violation of their own and their parents' religious convictions.

The Washington Supreme Court ultimately determined that religious toleration was fundamental under the Washington Constitution. The Court indicated that one of the more important duties of the court is to guard and maintain the state's constitutional guarantees of religious liberty and to ensure that those guarantees are not restricted because it may be considered that the enforcement of some law restricting religious liberty would be of little consequence or affect few persons. Respect for the flag is required, but the Bolling children never showed disrespect. The Court noted:

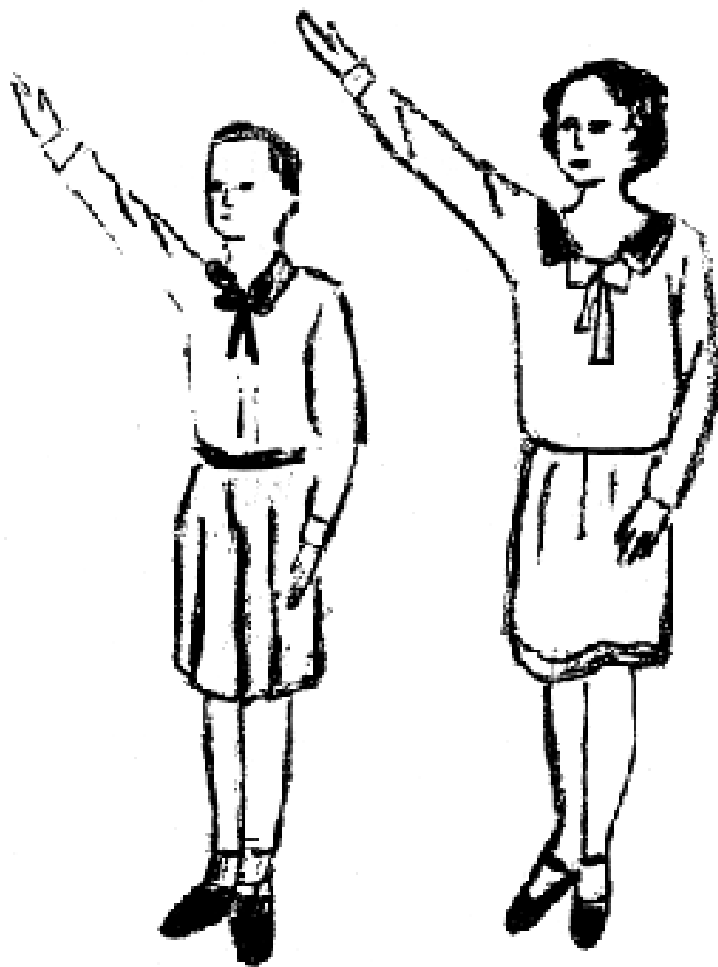
The children of petitioners, by standing respectfully at attention during the exercises comprising the salute to the flag, will show due respect to the national standard during the ceremony, and the fact that because of their conscientious scruples they are excused from doing that which the law provides shall be done, and which others cheerfully do, should impress not only those who claim the privilege of following their religious convictions, but all others, with the fact that the flag protects each citizen, and that the government of which it is the symbol guarantees to all religious liberty.

Bolling at 809-810.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943). West Virginia statutes required all schools to conduct courses of instruction in history, civics, and in the Constitutions of the United States and the State for "the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of government." The

²⁷The Gobitis decision was short-lived. In 1943, the United States Supreme Court used Barnette to overrule its decision in Gobitis. See West Virginia State Board of Education v. Barnette, 319 US 624, 63 S.Ct. 1178 (1943), *infra*.

West Virginia State Board of Education (Board) was directed to “prescribe the courses of study covering these subjects[.]”²⁸ In response, the Board adopted a resolution providing that the salute to the flag become a regular part of the program in all public schools, that all teachers and pupils be required to participate in the salute and that refusal to salute the Flag be regarded as an act of insubordination. The resolution originally required the “commonly accepted salute to the Flag.” This salute, as originally defined in the resolution, is shown in the following illustration:



Right Arm Salute to the Flag During the Reciting of the Pledge of Allegiance, A Standardized Ritual in Many Public Schools, 1892 to about 1950. (Illustration by Roxanna Baer based on illustrations in *The Youth's Companion*.)

²⁸§ 1734, West Virginia Code (1941 Supp.).

Objections to this salute as being too much like Hitler's Nazi Party salute were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. In response to these objections, the "commonly accepted salute to the Flag of the United States" was changed, and described as "the right hand placed upon the breast" as the Pledge was repeated in unison. Barnette, 319 U.S. at 627-8, n. 3.

The Board refused to make similar concessions to those objecting to the Pledge on religious grounds.²⁹ The Jehovah's Witnesses objected to the Pledge of Allegiance as being contrary to their religious beliefs. Instead, they offered, in lieu of participating in the daily flag salute, to periodically and publicly give the following:

I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.³⁰

As noted above, refusal to participate in the salute and Pledge to the flag was regarded as insubordination. A child who refused to participate was to be expelled, with readmission being denied until such time as the child complied. During the expulsion, the child was considered unlawfully absent and subject to delinquency proceedings. Parents were liable to prosecution for failing to ensure attendance. The plaintiffs in this case were Jehovah's Witnesses. The children had been expelled, and were threatened with expulsion for failing to participate in the Pledge. They were threatened with being sent to reformatories for criminally inclined youth. Parents were prosecuted, and threatened with prosecution, for causing delinquency. Barnette, 319 U.S. at 630.

The Supreme Court noted that to sustain the compulsory flag salute, it would have to find that the Bill of Rights, "which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." Id., at 634. On its way to finding the Board's resolution in violation of the First and Fourteenth Amendments to the Constitution of the United States, the Court stated:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and

²⁹This was before Congress added "under God" to the language of the Pledge. In the 1940's, at the time of this litigation, the Pledge of Allegiance was as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all.

³⁰Barnette, 319 U.S. at 628, n. 4.

country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian, unity down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

Id., at 640-41.

Since Barnette, many lower courts have reaffirmed the principle that when students are forced to recite or participate in the Pledge of Allegiance, such coercion violates their rights under the Free Exercise Clause of the First Amendment. *See, e.g., Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1066 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1029 (1988); Lanner v. Wimmer, 662 F.2d 1349, 1354 (10th Cir. 1981); Lipp v. Morris, 579 F.2d 834, 835-36 (3d Cir. 1978) (a student was threatened by school officials when she refused to stand during the pledge); Goetz v. Ansell, 477 F.2d 636, 737-39 (2d Cir. 1973) (students who were opposed to the Pledge had to either stand in silence, leave the room, or face expulsion); Banks v. Board of Public Instruction, 314 F.Supp. 285 (S.D.Fla. 1970), *vacated* 401 U.S. 988, 91 S.Ct. 1223 (1971), (a student was suspended for refusing to stand during the pledge); and Frain v. Baron, 307 F.Supp 27, 31-34 (E.D.N.Y. 1969). As noted in Rabideau v. Beekmantown Central School District, 89 F.Supp.2d 263 (N.D.N.Y. 2000), “[I]t is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so.” (Citations omitted.) Id., at 267.

While Barnette and the lower court cases that followed have firmly established the principle that students cannot be compelled to recite the Pledge, the Supreme Court has not addressed any challenges to the Pledge of Allegiance since Congress added the words “under God” in 1954. For some, this new language made the Pledge not only a patriotic oath but a religious prayer as well. A challenge to an Illinois statute providing for the recitation of the Pledge each school day required the Seventh Circuit Court of Appeals to address not only whether the statute violated the principle set forth in Barnette, but whether the Pledge, with the words “under God,” violated the Establishment Clause of the First Amendment.

In Sherman v. Community Consolidated School District 21 of Wheeling, 980 F.2d 437 (7th Cir. 1992), *cert. den.* 508 U.S. 950, 113 S.Ct. 2439 (1993), the Seventh Circuit Court of Appeals addressed the constitutionality of an Illinois statute that provided: “The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public schools.” (Ill.Rev.Stat. ch. 122 ¶27-3). The plaintiffs in the case claimed the statute unconstitutionally required students to recite the Pledge each school day, while the defendant maintained that the lack of any penalty for nonparticipation in the Pledge demonstrates that students are not compelled to recite the Pledge. And, as applied in the Wheeling school district, no student was compelled to participate nor punished for failure to take part in the Pledge. The Court noted, however, that the requirements of a law depend not on what it omits but the language it contains. If “pupils” means “all pupils,” then the statute is unconstitutional. On the other hand, if it means “willing pupils,” then there is no constitutional violation. Sherman, 980 F.2d at 442. The Court went on to note that the Illinois Supreme Court attempts to interpret statutes in ways to save rather than destroy them. With this in mind, and considering the fact that the law was enacted long after the Supreme Court’s ruling in Barnette, it would be most logical to interpret the statute in question to refer to “willing pupils” rather than “all pupils.” Although the statute indicated the Pledge *shall be recited* each school day, the requirement is that administrators and teachers *shall* lead the Pledge. Leading the Pledge is not optional, but participation by pupils is. Sherman, at 442.

The Seventh Circuit then went on to address the question of whether “under God” makes the Pledge a prayer, whose recitation violates the Establishment Clause of the First Amendment. The Court determined that the founders of the United States did not deem ceremonial invocations of God as “establishment.” The Court went on to note a variety of instances in which our founders participated in ceremonial invocations, including:

- C James Madison, author of the First Amendment, issued presidential proclamations of religious fasting and thanksgiving.
- C Thomas Jefferson signed treaties sending ministers to the Indians.
- C The tradition of thanksgiving proclamations began with President Washington, who also presided over the constitutional convention.
- C From the outset, witnesses in our courts have taken an oath on the Bible.
- C Thomas Jefferson’s Declaration of Independence contains multiple references to God.
- C Madison and Jefferson invoked the name of the Almighty in support of their declaration supporting separation of church and state.

Id. at 445-46.

While the United States Supreme Court has not specifically addressed the Pledge since “under God” was added in 1954, the Seventh Circuit did look at the Supreme Court’s reference to the Pledge and other religious acknowledgments in other contexts. In Lynch v. Donnelly, 446 U.S. 668, 104 S.Ct. 1355 (1984), the Supreme Court included the Pledge in a list of civic exercises with religious connotations, which the Court implied are permissible. Lynch at 676, 104 S.Ct. at 1361. Justice Sandra Day O’Connor, in her concurring opinion, also expressed the view that Thanksgiving, “In God We Trust,” and similar “government

acknowledgments of religion...” are permissible as they serve a “legitimate secular purpose of solemnizing public occasions....” Justice O’Connor further noted that these practices are not understood as conveying approval of any particular religious beliefs. *Id.* at 693, 104 S.Ct. at 1369 (O’Connor, J., concurring).

Justice William H. Brennan, Jr., expressed a similar view in his concurring opinion in Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963):

[W]e have simply interwoven the motto [In God We Trust] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the pledge of allegiance, for example, may well merely recognize the historical fact that our Nation was believed to have been founded “under God.” Thus, reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln’s Gettysburg Address which contains an allusion to the same historical fact.

Schempp, at 303-04, 83 S.Ct. at 1614 (Brennan, J., concurring).

Today, fewer than one-half of the states require the recitation of the Pledge of Allegiance in the public schools.³¹ Although Indiana is not among those states requiring daily recitation of the Pledge by its students, the public schools are required to observe certain commemorations:³²

1. The following legal holidays: New Year’s Day, January 1; Martin Luther King, Jr.’s Birthday, the third Monday in January; Abraham Lincoln’s Birthday, February 12; George Washington’s Birthday, the third Monday in February; Good Friday, a movable feast day; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Election Day, the day of any general, municipal, or primary election; Veterans Day, November 11; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25; and Sunday, the first day of the week. (I.C. 1-1-9-1).
2. The eleventh day of December as Indiana Day. (I.C. 1-1-10-1).
3. The fourteenth day of June as Flag Day. (I.C. 1-1-11-1).

³¹According to *The Chicago Tribune*, only 20 states require the Pledge to be recited daily in public schools, and of these, Illinois is the only state to exempt high schools from the requirement. Legislation has been introduced to require Illinois high schools to recite the Pledge. See, “Two High Schools Institute Pledge,” *The Chicago Tribune*, Northwest Edition, November 26, 2001, Section 2. According to *Education Week*, 24 states require daily recitation of the Pledge. See, “Patriotism and Prayer: Constitutional Questions are Muted,” *Education Week*, October 10, 2001, pp. 14-15.

³²IC 20-10.1-2-4. This law does not require the public schools to close on these dates.

4. November 11 as Veterans' Day.³³ (I.C. 1-1-11-2).

Additionally, the superintendent of each school may prepare appropriate exercises for the school and community to observe Arbor Day, the last Friday of April. Arbor Day is designated for general observance to encourage the planting of shade and forest trees, shrub, and vines. (I.C. 20-10.1-2-3.)

The governing body of each school corporation is required to obtain a United States flag, four by six feet in size, and display the flag on every school in the school corporation each day that school is in session. The school corporation is further required to establish rules and regulations for the care, custody and display of the flag. (IC 20-10.1-2-6.) While recitation of the Pledge of Allegiance is not required, the Pledge is among a list of patriotic writings required to be maintained in each school library. (I.C. 20-10.1-4-2.5.)

Recitation of the Pledge is among a list of new requirements for schools proposed during the 2002 session of the Indiana General Assembly in Senate Bill No. 2. Among other provisions, this bill would require the following:

- a. The United States flag shall be displayed in each classroom of each school in a school corporation.³⁴
- b. The governing body of each school corporation shall provide a daily opportunity in each classroom of the school corporation for students to voluntarily recite the Pledge of Allegiance. A student is exempt from participation in the Pledge of Allegiance and may not be required to participate in the Pledge of Allegiance if:
 - (1) the student chooses not to participate; or
 - (2) the student's parent chooses to have the student not participate.

The proposed language makes it clear that a student cannot be required to participate in the Pledge. This is true whether the student objects or the student's parent objects. Further, neither the parent nor the student could be required to provide justification for refusal to participate. These provisions would meet the constitutional requirements set forth in Barnette and Sherman. Neither does the requirement that the flag be displayed in each classroom offend the Constitution. Indeed, to properly recite the Pledge, one should be facing the flag.³⁵

³³IC 1-1-11-2(b) further requires that "[S]chool corporations shall observe Veterans' Day each year with appropriate exercises in commemoration of the historical events associated with the day."

³⁴It does not appear, however, that the General Assembly provided funding for the schools to acquire flags for all of their classrooms.

³⁵4 U.S.C. § 4 provides as follows:

The Pledge of Allegiance to the Flag, "I pledge allegiance to the Flag of the United States of

A MOMENT OF SILENCE

In a 1985 decision, the U.S. Supreme Court invalidated on Establishment Clause basis an Alabama statute authorizing a one-minute period of silence in all public schools “for meditation or voluntary prayer.” Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985). In a concurring opinion, Justice Sandra Day O’Connor observed that a moment-of-silence law that did not have the primary purpose of promoting prayer might pass constitutional muster. 472 U.S. at 74-76, 105 S.Ct. at 2499-2500.³⁶ Justice O’Connor’s opinion has been quickly put to the test.

In Bown v. Gwinnett Co. Sch. Dist., 895 F.Supp. 1564 (N.D. Ga. 1995), *affirmed*, 112 F.3d 1464 (11th Cir. 1997), Georgia’s “Moment of Quiet Reflection in Schools Act” satisfied constitutional muster. The 1994 law provided for a brief period of quiet reflection for not more than 60 seconds at the beginning of every school day. Prayer was not mentioned, and the Act did not penalize anyone who elected not to take part in the period of quiet reflection. The constitutionality of the Act was not placed in jeopardy because of statements by some legislators who voted for the law indicating that their intent was to restore prayer to the public schools.³⁷

Virginia Tests the Judicial Waters

The Supreme Court has not visited the moment-of-silence issue since Wallace in 1985...until this past summer. The highly publicized Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001) involved legislative maneuvering by the Virginia General Assembly when it amended a 1976 law that authorized—but did not require—local school boards to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to meditate, pray, or engage in other silent activity. In 2000, the Virginia legislature amended the 1976 law to require every school district to provide a minute of silence in its classrooms. The amended law read in relevant part:

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from religious

America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all[.]”, should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

³⁶See “Meditation/Quiet Time,” **Quarterly Report** April-June: 1997.

³⁷In Goals 2000: Educate America Act, 20 U.S.C. §6061 (1994), states and local school systems are prohibited from adopting “policies that prevent voluntary prayer and meditation in public schools.”

observation on school grounds, the school board of each school division shall establish the daily observance of one minute of silence in each classroom of the division.

During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

Va. Code. Ann. §22.1-203 (2000), 258 F.3d at 271, *n.* 1. Debate in the legislature revealed passions on all sides, including those who doubted the constitutionality of the law and others who wished to restore prayer to the public schools. The federal district court found the amended law satisfied the criteria created under Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), in that the law was enacted for a secular purpose, did not advance or inhibit religion, and did not create excessive entanglement between government and religion. At 273. The 4th Circuit affirmed, noting that the First Amendment was designed to protect religious liberty. “[T]he Religion Clauses [of the First Amendment] must not be interpreted with a view that religion be suppressed in the public arenas in favor of secularism.” At 274.

The 4th Circuit evaluated the amended law based on its text, context, and legislative history, employing the Lemon test. The statute, the court found, provided a neutral medium—silence—during which a student may engage in religious or non-religious activity so long as silence is preserved. “[T]he silence is designed to be undirected and unthreatening; it is designed to compromise no student’s belief or nonbelief; and it is designed to exert no coercion except that of maintaining silence.” At 276. The accommodation of religion can be a secular purpose. In this case, the “minute of silence” permits nonreligious meditation as well as personal, religious activity. “Even though religion is thus the object of one of the statute’s purposes, the *accommodation* of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution.” Id. (emphasis original).

The statute is facially neutral “between religious and nonreligious modes of introspection and other silent activity.” At 277. Any involvement between government and religion “is negligible, left only to informing students that one of the permissible options during the moment of silence is prayer.” At 278. “[I]n establishing a minute of silence, during which students may choose to pray or to meditate in a silent and nonthreatening manner, Virginia has introduced at most a minor and nonintrusive accommodation of religion that does not establish religion.” Id.

On August 31, 2001, the plaintiffs appealed the case to the U.S. Supreme Court. They asked the Supreme Court to halt the “moment of silence” law while the case was reviewed. On September 12, 2001—the day after the terrorist attacks at the World Trade Center and the Pentagon—Chief Justice William Rehnquist declined, stating “[B]y contrast [from the circumstances in Wallace], after more than a year of operation, the Virginia statute providing for a minute of silence seems to have meant just that. There is no allegation that Virginia schoolteachers have used the minute of silence, or any other

occasion, to lead students in collective prayer.” Brown v. Gilmore, 122 S. Ct. 1, 3 (2001). Chief Justice Rehnquist also noted that the plaintiffs had an opportunity a year earlier to appeal the 4th Circuit’s denial of injunctive relief but did not do so. “That they did not do so is somewhat inconsistent with the urgency they now assert.” Id.

On October 29, 2001, the U.S. Supreme Court declined to review the 4th Circuit’s decision, letting stand the Virginia law. Brown v. Gilmore, 122 S.Ct.465 (2001). At that time, according to the plaintiffs in Brown, there were eight other states that had laws requiring a minute of silence: Alabama, Connecticut, Georgia, Massachusetts, Nevada, Rhode Island, Tennessee, and West Virginia. A spokesman for one of the plaintiffs attempted to minimize the Supreme Court’s action. “This is not Supreme Court approval,” Joe Conn of Americans United for Separation of Church and State told *Education Daily*,³⁸ adding that he was not worried that the court’s refusal to hear the case would encourage other states to create similar laws.

Indiana Wades In

Mr. Conn’s assessment turned out not to be prophetic. Other states are pursuing legislative enactments, modeling proposed language after the Virginia statute. Indiana is by no means an exception.

In 1975, Indiana enacted a “voluntary religious observance; silent period” law. The law, which is still “on the books,” reads as follows:

In each public school classroom, at the opening of each school day, the teacher in charge may or, if directed by his governing body, shall conduct a brief period of silent prayer or meditation with the participation of all students assembled. This silent prayer or meditation is not a religious service or exercise and may not be conducted as one, but is an opportunity for silent prayer or meditation on a religious theme for those so inclined or a moment of silent reflection on the anticipated activities of the day.

I.C. 20-10.1-7-11 (Acts 1975, P.L. 240, Sec. 1). The statute, as it presently reads, would not satisfy judicial scrutiny. In the 2002 session of the Indiana General Assembly, three bills have been introduced, all incorporating language from the Virginia statute.³⁹ Senate Bill No. 2, which also included the mandatory recitation of the Pledge of Allegiance,⁴⁰ repeals I.C. 20-10.1-7-11 and proposes the following:

³⁸Tuesday, October 30, 2001, Vol. 34, No. 207.

³⁹House Bill Nos. 1039, 1156; Senate Bill No. 2.

⁴⁰See “The Pledge of Allegiance and Public Schools,” *supra*.

I.C. 20-10.1-4-3.5.

Sec. 3.5. (a) In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the state either to engage in or to refrain from religious observation on school grounds, the governing body of each school corporation⁴¹ shall establish the daily observance of a one (1) minute period of silence in each classroom of the school corporation.

(b) During this one (1) minute period of silence that subsection (a) requires, the teacher responsible for a classroom shall ensure that all students remain seated and silent and make no distracting display to the end that each student may, in the exercise of the student's individual choice, meditate, pray, or engage in any other silent activity that does not interfere with, distract, or impede other students in their like exercise of individual choice.

All three bills enjoy wide bi-partisan support.

Louisiana Strikes Out

Louisiana, like Indiana and other states, enacted a law in 1976 that permitted school authorities to allow students and teachers to observe a "brief time in silent meditation" at the beginning of each school day. However, in 1992, the statute was amended to allow observance of a "brief time in silent *prayer or meditation*." La. Rev. Stat. §17:2115(A) (West 1992) (emphasis added by court). In 1999, the Louisiana legislature amended the law again, deleting the word "silent" so that the statute then read:

Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in prayer or meditation.⁴²

The lawsuit followed. The federal district court found the amended law unconstitutional. On December 11, 2001, the 5th Circuit Court of Appeals affirmed. Doe v. School Board of Ouachita Parish et al., 274 F.3d 289 (5th Cir. 2001).

In Brown v. Gilmore, *supra*, the plaintiffs argued that Virginia's statute was similar to the Alabama statute found unconstitutional by the Supreme Court in Wallace v. Jaffree, *supra*. However, the 4th

⁴¹Indiana refers to many of its school districts as "school corporations." It has the same meaning as "school district."

⁴²La. Rev. Stat. §17.2115(A) (West 1999).

Circuit disagreed, noting that the Alabama statute’s legislative history and its plain language was part of a “campaign of defiance” by the Alabama legislature, who expressed displeasure with previous Supreme Court decisions, notably Everson v. Bd. of Ed., 330 U.S. 1, 14-16, 67 S.Ct. 504 (1947), which applied the Establishment Clause of the First Amendment to the States through the Fourteenth Amendment. 258 F.3d at 279. This same defiant attitude was not present in Virginia’s legislature, although some supporting legislators expressed this sentiment.

The 5th Circuit in Doe found that “this case is virtually indistinguishable from Wallace v. Jaffree [citation omitted], where the Supreme Court held that the statute in question violated the first prong of the Lemon test [enactment lacked a secular purpose] and thus was unconstitutional.” 274 F.3d at 293.

A Court’s finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency.⁴³ The plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose. Moreover, in determining the legislative purpose of a statute, the Court has also considered the historical context of the statute, and the specific sequence of events leading to passage of the statute.

274 F.3d at 293-94, quoting Edwards v. Aguillard, 482 U.S. 578, 594-95, 107 S.Ct. 2573, 2583 (1987). The 1999 amendment “was motivated by a wholly religious purpose. It accomplished only one thing—the deletion of the word ‘silent’ from a statute that authorized ‘silent prayer or meditation.’ The purpose of the amendment is clear on its face—it is to authorize *verbal* prayer in schools.” At 294. (emphasis by court). The pre-existing statute already protected silent prayer, the court noted. The 1999 amendment did not serve any purpose other than to change existing law and allow verbal prayer in public schools. Id. “The amendment’s sponsors stated that it was an instrument to allow verbal prayer in schools. Other legislators who supported the bill indicated that their understanding of the bill and their intent in seeking its passage was the same as that of the sponsors.” Id.

“The plain language and nature of the 1999 amendment as well as the legislators’ contemporaneous statements demonstrate that the sole purpose of the amendment was to return verbal prayer to the public schools.” The Louisiana statute is, as a consequence, unconstitutional.⁴⁴ At 294-95.

⁴³The “interpretation by a responsible administrative agency” analysis played a significant role in the Brown v. Gilmore case. Precursors to the statute at issue in Brown required the Virginia Board of Education to develop and disseminate guidelines. The guidelines were consistent with Supreme Court decisions. See, e.g., 258 F.3d at 270-71.

⁴⁴The Supreme Court in Wallace, 472 U.S. at 56-57, relied on Alabama legislators’ statements in confirming the existence of a religious purpose. The 4th Circuit declined to apply a few statements of Virginia legislators who did want to return verbal prayer to public schools because the discussion in the Virginia legislature was balanced, with many opinions offered on all sides. See 258 F.3d at 271-73.

COURT JESTERS: BREWING CONTROVERSY

Candy
is dandy
But liquor
is quicker.⁴⁵

Beer, on the other hand, must be a senses-taker. At least that appears to be what was on tap for the plaintiff in Overton v. Anheuser-Busch Co., 517 N.W.2d 308 (Mich. App. 1994), *app. den.* 527 N.W.2d 511, who sued when he failed to enjoy the “good life” portrayed in the television commercials for a well known beer.

In support of his claims, plaintiff pointed to defendant’s television advertisements featuring Bud Light as the source of fantasies coming to life, fantasies involving tropical settings, and beautiful women and men engaged in unrestricted merriment.

At 309. Overton apparently consumed the beer (in quantities not disclosed), and was disappointed when he was still in Michigan, there were no beautiful women clamoring for his attention, he was not otherwise “engaged in unrestricted merriment,” and he was...well...he was still Overton.⁴⁶ He alleged false and deceptive advertising, which resulted in his massive disappointments. For these injuries, he “sought monetary damages in excess of \$10,000, alleging the defendant’s misleading advertisements had caused him physical and mental injury, emotional distress, and financial loss.” Id.

Legal action is not the proper forum for what Ales you, the court noted, as it bounced Overton for initiating a Lawsuit Lite. Although the plaintiff argued that the commercial “falsely suggests that defendant’s beer is the source of fantasies come to life,” there are better heads on beer than on the plaintiff’s shoulders.

“Such grandiose suggestion constitutes puffing,⁴⁷ which does not give rise to actionable fraud,” the court concluded. Id.

This proves once again that beer is not brain food...even if it did make Bud Wiser.

⁴⁵Ogden Nash, “Reflections on Ice-Breaking,” Many Long Years Ago (1931). Nash (1902-1971), an American writer, is best known for his humorous verses.

⁴⁶Had the plaintiff merely waited for the next advertising campaign, he might have realized more practical fantasies associated with beer drinking. He does seem capable of attracting frogs and lizards. With enough beer, they may even seem to talk.

⁴⁷“Puffing” or “puffery” refers to obvious exaggerations in commercial advertisements. Beer commercials always “puff” the benefits of the drink, making the results appear Lager than life.

QUOTABLE. . .

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Supreme Court Justices Hugo L. Black
and William O. Douglas, concurring,
West Virginia State Bd. of Education v.
Barnette, 319 U.S. 624, 644 (1943).

Date: _____

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